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January 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: August 11, 2004
Case No.: TIA-0162

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for XXXXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contactor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the

worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a patrolman, raw material operator and machinist at the DOE's Savannah River site (the site). He worked at the site for approximately thirty-two years, from January 1953 to April 1985.

The Applicant filed an application with OWA, requesting physician panel review of prostate cancer. The Panel determined that the Worker's illness was not due to toxic exposure at the DOE site. The OWA accepted the Panel's negative determination. In her appeal, the Applicant challenges the negative determination.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each

claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

In her original submission to the OWA, the Applicant asserted that the Worker worked with enriched uranium and the construction of target rods. In her appeal, the Applicant adds that the Worker was exposed to radiation which was not well-monitored in the early years of his employment at the site.¹

In its report, the Physician Panel observed that "the claimant's history is significant for evidence of exposure to ionizing radiation."² However, the Panel also stated that the Worker's onset of prostate cancer occurred at "the expected age that malignancy occurs in the general population."³ Moreover, the Panel stated that there is no association between ionizing radiation and prostate cancer. Therefore, the Panel concluded that the Worker's cancer was not related to exposure to radiation at the site.

As the foregoing indicates, the Physician Panel addressed the claimed illness, made a determination, and explained the reasoning for its conclusion. The Applicant's argument about the Worker's exposures is merely a disagreement with the Panel's medical judgment; it is not a basis for finding Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0162 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

¹ See Applicant's Appeal Letter.

² Panel Report at 1.

³ *Id.*

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 6, 2005